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Nos. 01-1118, 01-1119

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*, *Petitioners,*

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *ET AL.*, *Respondents.*

OPERATION RESCUE, *Petitioner,*

v.

NATIONAL ORGANIZATION FOR WOMEN, INC. *ET AL.*, *Respondents.*

On Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER OPERATION RESCUE

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c).

2. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion" -- and which defines "extortion" as "the *obtaining of property* from another, with [the owner's] consent," where such consent is "induced by the wrongful use of actual or threatened force, violence, or fear" (18 U.S.C. § 1951(b)(2) (emphasis added)) -- criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

PARTIES

In addition to petitioner Operation Rescue,[1] the following parties were defendants-appellants in the Seventh Circuit and are petitioners here:

Joseph M. Scheidler
Pro-Life Action League, Inc.
Andrew D. Scholberg
Timothy Murphy

Respondent National Organization for Women, Inc. (NOW), plaintiff-appellee below, sued on behalf of itself and its members and was certified as representative of the plaintiff "class of women who are not NOW members and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities." OR Pet. App. 269a. In addition, there are two other named respondents, the Delaware Women's Health Organization, Inc. (DWHO) and the Summit Women's Health Organization, Inc. (Summit). Both DWHO and Summit sued on behalf of themselves and were certified as representatives of the plaintiff "class of all women's health centers in the United States at which abortions are performed." *Id.* These respondents, like NOW, were plaintiffs-appellees in the Seventh Circuit.

[1]Operation Rescue is not a corporation. *See* S. Ct. Rule 29.6.

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ABBREVIATIONS KEY

App.	Appendix
JA	Joint Appendix
Opp.	Brief in Opposition
OR	Petitioner Operation Rescue (No. 01-1119)
PA	Plaintiffs' Appendix in the Seventh Circuit
Pet.	Petition for Writ of Certiorari
RA	Appendix to OR's Reply to Brief in Opposition (No. 01-1119)
Resp.	Response in Support of Petition for Writ of Certiorari (No. 01-1118)
Sch.	Petitioners Joseph Scheidler, *et al.* (No. 01-1118)
Tr.	Transcript of trial

DECISIONS BELOW

All pertinent decisions in this case to date are entitled *National Organization for Women v. Scheidler*. The district court's original dismissal of the case appears at 765 F. Supp. 937 (N.D. Ill. 1991), and the Seventh Circuit's affirmance at 968 F.2d 612 (7th Cir. 1992). This Court's previous partial grant of certiorari appears at 508 U.S. 971 (1993), and subsequent reversal at 510 U.S. 249 (1994). On remand, the district court's partial dismissal of the case appears at 897 F. Supp. 1047 (N.D. Ill. 1995), and the district court's certification of plaintiff classes appears at 172 F.R.D. 351 (N.D. Ill. 1997). The Seventh Circuit's decision below, affirming judgment for respondents, appears at 267 F.3d 687 (7th Cir. 2001).

JURISDICTION

The U.S. Court of Appeals rendered its panel decision on October 2, 2001, and denied timely petitions for rehearing and rehearing en banc on October 29, 2001. Petitioners filed timely petitions for certiorari on January 28, 2002. This Court granted certiorari on April 22, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES

The Appendix to OR's Petition for Certiorari contains the text of the Hobbs Act, 18 U.S.C. § 1951 (App. N), and excerpts of the federal Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §§ 1961, 1964 (App. O).

STATEMENT OF THE CASE

This is a civil RICO case. Respondents -- plaintiffs below -- are the National Organization for Women, Inc. (NOW), the Delaware Women's Health Organization (DWHO), the Summit Women's Health Organization (Summit), and the classes they

were certified to represent. (The plaintiffs changed over the course of the litigation. For convenience, this brief refers collectively to "NOW.") The petitioners, including Operation Rescue (OR), are pro-life activist organizations and individuals.

It is undisputed that petitioners all share the goal of stopping abortion, and that this is a lawful goal, *e.g.*, Tr. 4315. It is likewise undisputed that petitioners, on their own and through the alleged RICO enterprise, engaged in a variety of constitutionally protected expressive activities. *E.g.*, Tr. 4291, 4293. The anti-abortion efforts at issue included extensive free speech activity, such as leafletting, writing, singing, praying, and other pure speech, pickets, sidewalk counseling, etc. *See* OR Pet. App. 17a ("All parties acknowledge that the defendants engaged in a substantial amount of protected speech during the protest missions and other anti-abortion activities").

Defendants explicitly embraced nonviolence for their efforts; indeed, OR went so far as to require a pledge of nonviolence for participants. *See, e.g.*, Tr. 1332, 1357-59, 2468, 2470; PA120, PA168, PA219. *See also* Tr. 982, 1263, 1265, 1271, 1815, 1971, 2262-63, 2378-79 (embrace of nonviolence).[2] The

[2]NOW sought to paint pro-life activists as extreme and violent by relying on isolated quotations taken out of context. For example, NOW cited the "Green Beret" image, suggesting militarism, yet the pertinent document gave as examples of "Green Berets" not just a "rescuer" willing to go to jail, but also someone who works "full-time with little or no pay for four months in the election of a pro-life candidate." PA100. NOW quoted Scheidler as urging pro-lifers to "take their fight against abortion to the doors of abortion clinics," but the letter to the editor in question refers to one-on-one sidewalk counseling outside abortion businesses, PA130. NOW quoted Scheidler using the phrase "pro-life mafia," but in context the term referred wryly to activism, not violence, PA182. *See also* PA122 (using term "aggressive tactics" to mean sit-ins and demonstrations).

NOW accused defendants of giving "special, private meanings" to the word "violence." Yet it was NOW's witnesses who defined "violence" to

(continued...)

nationwide activities at issue spanned some fourteen years. OR Pet. App. 285a, but the jury found only four acts or threats of violence, against either persons or property, by unnamed persons associated with the alleged enterprise. JA 144 (#4(e)).

NOW sought to impose liability upon petitioners for any act, no matter how isolated, that anyone participating in a pro-life demonstration supposedly committed.[3] *E.g.*, Tr. 2228, 2231 (quoted in OR Pet. at 27-28); OR Reply at 2-3 & n.4. Over petitioners' objection, Tr. 4495-98,[4] the district court did not require the jury to identify any particular alleged incidents of wrongdoing.[5] Instead, the district court approved a verdict form that allowed the jury to impose liability for unspecified acts by "any other person associated with PLAN [Pro-Life Action Network, the alleged RICO enterprise]," JA 143 (#4) (predicate acts). *See also* JA 145 (#7) (RICO pattern may be based on acts of "persons associated with PLAN"); *id.* (#9) (proximate cause may rest on acts of "any person associated with PLAN"). The jury then found some two dozen unidentified predicate acts to have been committed by unspecified persons "associated with PLAN," that at least two of those acts proximately caused injury to the respondents, and that respondents Summit and DWHO

[2](...continued)
include virtually all pro-life activism. *See, e.g.*, Tr. 730 (Susan Hill) ("every rescue event that has been conducted in this country in the last 15 years by Operation Rescue" has "felt violent to us"); Tr. 1268 (Maureen Burke) ("every act of civil disobedience that would block access to an abortion clinic" is violent, even if "entirely passive, peaceful, nonresistant, silent"), 1278 (Burke) (sidewalk counseling, yelling, raising voice all violent).

[3]Petitioners demonstrated in detail in their joint Rule 60(b) motion (which the district court denied for other reasons) that at least some of the alleged incidents of misconduct were fabricated or unconnected to petitioners.

[4]The district court repeatedly admonished that an objection by any defendant would be deemed made on behalf of all. Tr. 475, 689, 5181.

[5]Thus, as the district court conceded, OR Pet. App. 254a, there is no way to know exactly what the jury found to qualify as extortionate predicates.

had suffered monetary damages from their RICO injuries. JA 143-46 (#4, 9, 10).[6] (No other party was awarded damages.)

As RICO predicates, NOW alleged "extortion" under the federal Hobbs Act, 18 U.S.C. § 1951, "extortion" under state law, and "extortion" under the federal Travel Act, 18 U.S.C. § 1952. NOW's theory of the case was that any physical obstruction of abortion -- e.g., by a sit-in -- was extortion against women and abortion businesses, and thus a predicate act of racketeering under RICO. *See, e.g.*, Tr. 4327; *id.* at 5003-09.[7] Petitioners were not alleged to have obtained any tangible property, Tr. 4327 -- or any intangible property like trademarks or stocks -- but only to have interfered with the rights of women and the business of abortion. *E.g.*, Tr. 4987 (respondents' closing argument) ("Property rights include a woman's right to choose what to do when faced with an unplanned pregnancy. Our most precious rights are the intangible ones . . ."). The district court adopted NOW's view of extortion. *E.g.*, OR Pet. App. 109a-111a, 195a-196a.

Under the district court's instruction, the jury was not required to find anything more than nonviolent sit-ins to find defendants liable for "extortion."[8] Tr. 4944-47. In closing

[6]The damages consisted exclusively of "extraordinary security costs." Tr. 2003-04.

[7]*E.g.*, Tr. 5003 (closing argument of plaintiffs) ("if the defendants prevented women from getting any of those services [provided by abortion businesses], then those interferences are RICO violations"); *id.* at 5005 ("Each and every one of those blockades that shut the clinics down for any period of time was an illegal act of extortion under RICO").

[8]While the jury found 25 acts or threats of "extortion," *infra* note 9, the jury found only four acts or threats of violence, JA 144 (#4(e)). Hence, the jury necessarily found that at least 21 -- and possibly all 25, *see infra* note 10 -- of the acts of "extortion" (sit-ins) were nonviolent.

One question on the jury verdict form asked whether the jury's findings of predicate extortion under the Hobbs Act or state law were "based solely

(continued...)

arguments, NOW argued for a jury finding of "no less than 30 blockades [i.e., sit-ins]." Tr. 5005, arguing that each sit-in was an act of predicate extortion, *id.* The jury apparently found 25 sit-ins total.[9] JA 143-44.[10]

After the jury found liability and damages under RICO, the district court imposed treble damages, granted a permanent injunction,[11] and entered judgment for NOW. OR Pet. App.

[8](...continued)
on blockades of clinic doors or sit-ins within clinics, without more." JA 145 (#6). In closing arguments to the jury, NOW argued that the phrase "without more" meant that the sit-ins "didn't keep anybody out." Tr. 4987. In other words, unless the sit-in participants always moved aside to let people "freely walk in," NOW argued, the jury must answer the question "no." Tr. 4987-88. *See also* TR. 5008 (quoted in OR Reply App. at 27). Consequently, this question became the meaningless one, "If you found extortion, was it based solely on a blockade or sit-in where participants stepped aside for anyone coming or going?" The jury's negative answer to this question thus did not indicate a finding that sit-ins were violent.

[9]The jury was instructed to treat each intentional sit-in at an abortion business as both *actual* and *attempted* extortion. *See* Tr. 4945-48 (quoted in Sch. Pet. App. 150a-152a). Accordingly, the jury found the same number of "acts or threats" as it did "attempts" in each category (25 each for federal or state "extortion," 23 each for Travel Act violations). JA 143-44. Furthermore, the instructions for state and federal extortion were virtually identical, Tr. 4944-47 (Sch. Pet. App. 150a-152a), with the difference that the federal version had an interstate commerce element, JA 136-37. Accordingly, the jury found a virtually identical number of violations in the state and federal categories, with only slightly fewer in the federal categories (presumably for lack of the interstate element). JA 143-44. Thus, a single sit-in would count simultaneously in Verdict Form boxes 4(a), (b), (d), (f), and (g), except that 4(a), (f), and (g) also had interstate travel or commerce elements. *Id.*

[10]NOW also argued for at least five *threats* of physical violence, Tr. 5013-16, and seven *acts* of physical violence, Tr. 5022-23, but the jury found only four acts *or* threats total. JA 144 (#4(e)).

[11]The district court rejected petitioners' contention that RICO does not authorize private parties to sue for injunctive relief. OR Pet. App. 131a-

(continued...)

260a-274a & n.10. 277a-282a.

On appeal, petitioners disputed the availability of private injunctive relief under RICO and contested the district court's failure to require NOW to plead or prove the required elements of predicate extortion. Petitioners specifically challenged NOW's failure to plead or prove the elements of "obtaining property," by "wrongful use of actual or threatened force, violence, or fear," and with the "consent" of the alleged victims.

The Seventh Circuit affirmed. The court of appeals held that private parties could sue for injunctive relief under RICO, OR Pet. App. 7a-17a, and that the Hobbs Act did apply to the conduct of petitioners or others associated with PLAN, *id.* at 35a-36a. In particular, the court of appeals held that, to satisfy the element of "obtaining property" under the Hobbs Act, a "loss to, or interference with the rights of, the victim is all that is required." *Id.* at 36a.[12]

SUMMARY OF ARGUMENT

The court of appeals erred both in reading RICO to authorize private injunctive relief and in reading the extortion section of the Hobbs Act to apply to the protest activities in this case.

The text and history of RICO's civil remedies provision clearly demonstrate that private parties are not entitled to sue for injunctive relief under RICO. The remedies section -- 18 U.S.C. §1964 -- confers unqualified authority on the federal government to "institute proceedings" under RICO, but gives private litigants only a right to sue for treble damages. RICO's

[11](...continued)
134a. 261a.

[12]The court of appeals believed -- erroneously, *see* OR Pet. at 5, 9 n.15, 23 -- that its affirmance of the Hobbs Act predicates sufficed to sustain the RICO judgment. OR Pet. App. 36a-37a. Accordingly, the court of appeals did not reach petitioners' challenges to predicate extortion under state law or the Travel Act. *Id.* at 36a-38a.

treble damages provision is borrowed from indistinguishable language in the federal Sherman and Clayton antitrust statutes, language which this Court had already held does *not* authorize private injunctive relief. While Congress adopted a separate provision in the Clayton Act conferring injunctive remedies on private litigants, Congress adopted no such provision for RICO. On the contrary, the statutory history of RICO shows the repeated failure of efforts to add precisely such a private injunctive remedy. Hence, the injunction in this case -- which rests exclusively on RICO -- must be reversed.

The lower court's theory of Hobbs Act extortion is also flawed. Extortion under the Hobbs Act requires "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Yet the court below read the Hobbs Act as criminalizing (and thus making RICO predicates of) mere interference with rights, as by the protest sit-ins in this case. Such a misreading of Hobbs Act extortion would make a racketeer out of Martin Luther King, Jr., temperance crusaders, abolitionists, and environmental or animal rights protesters, a result which itself suggests the implausibility of the lower court's ruling. The text of the Hobbs Act supports no such reading of extortion. As demonstrated by recourse to the plain meaning of the text, confirmed by the historical roots of that text, extortion requires the *acquisition of property*, not mere damage to or interference with intangible rights.

Moreover, the claim that a nonviolent protest sit-in qualifies as extortion -- the theory supporting the judgment below -- ignores the required elements of "consent," "wrongfulness," and "force, violence, or fear," all of which are lacking here. Accordingly, the judgment must be reversed.

ARGUMENT

This case raises the questions of the availability of private injunctive relief under civil RICO and the scope of Hobbs Act extortion, a predicate offense under RICO. The Seventh Circuit erred both in holding private injunctive relief to be available under RICO and in holding that Hobbs Act extortion was properly pled and proved in this case. The judgment of the Seventh Circuit is wrong and must be reversed.

I. RICO DOES NOT AUTHORIZE PRIVATE INJUNCTIVE RELIEF.

RICO does not authorize injunctive relief in civil suits brought by private parties. In RICO, Congress employed language taken almost word-for-word from antitrust law, language which this Court had already held *not* to authorize private injunctive relief. Congress eschewed other language, in antitrust law, expressly conferring private injunctive remedies. The exclusion of private injunctive relief from civil RICO could scarcely be clearer.

The decision below is aberrant and erroneous. The virtually unanimous conclusion of the lower courts analyzing the issue -- that RICO does not authorize injunctive relief for private parties -- is clearly correct.[13]

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[13]Many lower federal courts have addressed this question. In *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), the Ninth Circuit exhaustively analyzed the text and history of the remedies section of RICO, the pertinent precedents, and the competing legal arguments, *see Wollersheim*, 796 F.2d at 1080-88. The *Wollersheim* court concluded that "the legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO." *Id.* at 1088 (footnote omitted). Moreover, virtually no court since *Wollersheim* -- other than in this case -- has held that private parties can obtain injunctive relief under RICO. Even prior to (continued...)

A. RICO's Statutory Text

1. Expressio unius

The remedies provision of RICO (18 U.S.C. § 1964), OR Pet. App. 308a-309a,[14] contains three subsections addressing civil relief. None gives injunctive relief to private parties.

Subsection (a) confers jurisdiction upon the district courts and authorizes broad equitable remedies. This provision, however, does not empower private litigants to seek the injunctive relief authorized.

Subsection (b) authorizes the U.S. Attorney General to "institute proceedings under this section." This unqualified authorization to "institute proceedings" plainly authorizes the federal government to pursue the full range of remedies for which subsection (a) creates jurisdiction.

Subsection (c) then specifies that "[a]ny person injured in his business or property . . . may sue therefor . . . and shall recover threefold the damages he sustains . . . ." Unlike subsection (b), there is no blanket authorization to "institute proceedings"; instead, using distinct language, the provision specifies a right

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[13](...continued)
Wollersheim, only one district court so held. *See infra* note 19. Every other court to address the issue (except in this case and one other district court case, *see infra* note 19) has either rejected private equitable relief under RICO, expressed serious doubts about such relief, or declined to decide the question. *See* OR Pet. at 11-12 & nn.16-19. (For an especially thorough analysis of the issue, *see Wollersheim*; *In re Fredeman Litig.*, 843 F.2d 821, 828-30 (5th Cir. 1988); *Sedima, S.P.R.L. v. Imrex*, 741 F.2d 482, 489 n.20 (2d Cir. 1984), *rev'd on other grounds*, 473 U.S. 479 (1985); *Kaushal v. State Bank of India*, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983); *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378, 1381-83 (N.D. Ill. 1984).)

[14]The version set forth in OR's Appendix was effective at the time the present lawsuit was filed. In 1995, Congress amended subsection (c) in a way irrelevant here. The 1995 amendment does not apply to actions, like the present suit, commenced prior to December 22, 1995.

to sue and a remedy, namely, treble damages. This Court's observation in *Russello v. United States*, 464 U.S. 16 (1983), therefore applies here:

> Where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Id. at 23 (internal quotation and editing marks omitted). Had Congress intended to confer on private parties an unqualified right to "institute proceedings," then -- in the words of *Russello* -- "it presumably would have done so expressly as it did in the immediately [preceding] subsection," *id.*

Subsections (b) and (c) are decidedly *not* parallel; hence, contrary to the court below, no "parity of reasoning," OR Pet. App. 10a, leads to the conclusion that private parties can claim the universe of relief authorized under subsection (a). On the contrary, as in *Russello*, this Court should

> refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.

464 U.S. at 23. Indeed, were the contrary true, private parties would be entitled to sue, not just for treble damages and injunctions, but also for all the other equitable relief available to the Attorney General, including dissolution of enterprises. *See* § 1964(a).

The statutory text of RICO therefore plainly indicates that Congress did *not* authorize private injunctive relief:

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.

Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); *accord Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-32 (1989). For example, this Court has held that a statute expressly authorizing private citizens to sue for injunctions would not be construed as implying a private right of damages. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). This rule makes perfect sense: "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.* at 15. *Accord Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

2. The antitrust parallel

The conclusion that private parties cannot obtain injunctive relief under RICO is confirmed beyond all doubt by reference to the antitrust model from which Congress borrowed the remedial provisions of RICO. Congress borrowed, for RICO, precisely the remedial language this Court had held *not* to authorize private injunctive relief, and *declined* to borrow a separate provision of antitrust law expressly conferring private injunctive remedies.

This Court construed the statutory language in question, in the Sherman antitrust statute, *not* to authorize private injunctive relief. *See Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904) (section 7 of antitrust statute does not authorize private suits for equitable relief). *Accord Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917). The parallels to RICO are striking. Section 7 of the Sherman antitrust statute provided:

> "Any person who shall be injured in his business or property . . . by reason of anything forbidden or declared to be unlawful by this act may sue therefor . . . and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

194 U.S. at 68 (quoting statute) (*see* RA at 1). The language of RICO § 1964(c) is virtually word-for-word the same.

Like RICO § 1964, the Anti-Trust Act construed in *Northern Securities* contained a subsection conferring on federal courts "jurisdiction to prevent and restrain violations of this act" (Section 4), *see* 194 U.S. at 67. (*See* RA at 1.) The existence of a similar grant of equity jurisdiction in RICO § 1964(a) (OR Pet. App. 308a) only bolsters the statutory parallel.

After *Northern Securities*, Congress in 1914 enacted the Clayton Antitrust Act. That statute contains the following treble damages language:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

15 U.S.C. § 15(a). This provision is borrowed straight from Section 7 of the Sherman Act -- i.e., the provision held *not* to authorize private injunctive relief. In addition to the treble damages provision, Congress *added* a *separate* provision authorizing private parties to sue for injunctions:

> Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . .

15 U.S.C. § 26. *See California v. American Stores Co.*, 495 U.S. 271, 287 (1990) (provision "filled a gap in the Sherman

Act by authorizing equitable relief in private actions"). This express conferral of private injunctive remedies has no parallel in RICO.

In sum, when enacting RICO § 1964, Congress borrowed the treble damages language of the Sherman and Clayton Acts, but did *not* borrow the private injunctive remedy language of the Clayton Act. The conclusion is inescapable: RICO does not authorize private injunctive relief.

With RICO, Congress employed the "use of an antitrust model for the development of remedies" against crime. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151 (1987). The "clearest current in the legislative history of RICO is the reliance on the [antitrust] model." *Id.* (internal quotation marks and citation omitted). *Accord Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985). It follows that the same language held *not* to authorize injunctive relief in an antitrust statute does *not* authorize injunctive relief under RICO:

> We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4 [15 U.S.C. § 15]. . . . It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

Holmes v. SIPC, 503 U.S. 258, 268 (1992) (citations omitted).[15]

* * *

[15]The Seventh Circuit declared that because this Court "regularly treats the remedial sections of RICO and the Clayton Act identically," OR Pet. App. 16a, RICO should be read as authorizing private injunctive relief "regardless of superficial differences in language." *id.* To state this argument is to refute it.

This Court appears already to have acknowledged that private injunctive relief is not available under RICO. This Court has consistently described RICO § 1964(c) as authorizing a "private treble-damages action," *Sedima*, 473 U.S. at 486. *Accord id.* at 481, 487-88, 490, 493; *Agency Holding Corp.*, 483 U.S. at 151-52; *Klehr v. A.O. Smith Harvestore Products, Inc.*, 521 U.S. 179, 183 (1997); *Rotella v. Wood*, 528 U.S. 549, 551 (2000); *Beck v. Prupis*, 529 U.S. 494, 496 & n.1 (2000) (describing RICO provisions for criminal penalties and civil suits, and separately noting that RICO "authorizes *the Government* to bring civil actions to 'prevent and restrain' violations") (emphasis added). The text of RICO confirms this Court's consistent understanding of civil RICO.

In its Brief in Opposition, NOW conceded that § 1964(c), the private remedies provision of RICO, does not authorize injunctive relief. Opp. at 9 ("RICO's *only* source of permanent injunctions is § 1964(a)") (emphasis added). NOW therefore hangs its entire case for injunctive relief on § 1964(a). This Court has already noted, however, that § 1964(a) is part of remedial provisions "limited to injunctive actions by the United States," *Sedima*, 473 U.S. at 486-87 (1985). Despite *Sedima*, NOW argues that because § 1964(a) does not *expressly exclude* private parties, it must be read to *include* them. Opp. at 9-10. This is illogical. Section 1964(a) does not, by its terms, authorize *any* party to bring a civil RICO action, including the federal government. The United States can sue for injunctive relief under RICO only because a separate subsection -- § 1964(b) -- gives the Attorney General authority to "institute proceedings under this section." By contrast, the private treble-damages provision, § 1964(c) -- the only subsection to authorize private relief -- contains no blanket authorization for private parties to "institute proceedings." That subsection only entitles persons injured in their business or property to "sue therefor . . . and recover threefold the damages," § 1964(c).

This subsection does not reference § 1964(a) or even "this section," but instead, as this Court has always understood, provides a distinct private damages remedy.

B. RICO's Legislative History

The legislative history of RICO confirms, indeed compels, the conclusion already drawn from the text of RICO: private injunctive relief is not available under RICO.

1. Selection of treble damages remedy

RICO was enacted as Title IX of the Organized Crime Control Act of 1970. *Sedima*, 473 U.S. at 486. The Senate, which passed the legislation first, did not provide for private party suits under RICO.

> The civil remedies in the bill passed by the Senate, S 30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d).

473 U.S. at 486-87. The "private treble-damages action" was added, later, in the House of Representatives. *Id.* at 487-88. The Senate then adopted the bill as amended in the House. *Id.* at 488. As the Fifth Circuit explained, "Section 1964(c), providing the treble damage remedy, then becomes a branch grafted onto the already-completed trunk of the statute." *Fredeman*, 843 F.2d at 829 (footnote omitted).

This "grafted-on branch" very specifically authorized "a private treble-damages action," *Sedima*, 473 U.S. at 487, as a supplement to federal government enforcement of the statute, and as a remedy for those wronged by organized crime, *id.* *See also Agency Holding Corp.*, 483 U.S. at 151 (RICO's civil enforcement provision was designed "to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees"); *id.* ("the mechanism chosen to reach the objective in . . . RICO is the carrot of treble damages"). The

selection of a treble damages remedy, and *only* a treble damages remedy, was plainly a deliberate choice by Congress.

2. Rejection of private injunctive remedy

That Congress deliberately limited private civil relief to treble damages (and costs and attorney fees) appears even more clearly from the rejection by Congress of proposals to authorize private injunctive relief:

> [I]n considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision.

Wollersheim, 796 F.2d at 1086 (emphasis in original).

RICO predecessor legislation in the Senate and in the House explicitly allowed for private party injunctive relief. *Id.* at 1084. *See* 115 Cong. Rec. 6,992-96 (1969) (discussing predecessor Senate bills); H.R. 19215, 91st Cong., 2d Sess. (1970) (predecessor House bill). In fact, Representative Steiger, who proposed the addition of the treble damages provision, *Sedima*, 473 U.S. at 487, made that proposal in an amendment which also included a provision for private injunctive relief. *See* 116 Cong. Rec. 27,738-39 (1970) (Steiger Amendment, proposed subsection (c), provided: "Any person may institute proceeding under subsection (a) [of § 1964] . . . [and] relief shall be granted in conformity with the principles which govern the granting of injunctive relief . . ."). The House Committee on the Judiciary, however, adopted only the private treble damages remedy, not the private injunctive remedy. *See* H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034. Rep. Steiger, while "extremely pleased . . . that the Judiciary Committee has approved . . . a provision authorizing treble damage actions by

private persons," 116 Cong. Rec. 35,227 (1970), nevertheless lamented that the committee version did "not do the whole job." *id.* In particular, Rep. Steiger bemoaned the fact that "the Judiciary Committee version . . . fails to provide . . . equitable relief in suits brought by private citizens." *Id.* at 35,228.

On the floor of the House, Rep. Steiger again "offered an amendment that would have allowed private injunctive actions" under RICO, *Sedima*, 473 U.S. at 487. *See* 116 Cong. Rec. 35,228, 35,346 (1970). "The proposal was greeted with some hostility . . . and Steiger withdrew it without a vote being taken." *Sedima*, 473 U.S. at 487-88. *See* 116 Cong. Rec. 35,346-47 (1970). As this Court has explained, the reason for this hostility, for the withdrawal of the proposal, and for the reference of the proposal instead to a committee, was precisely because the proposed amendment "included yet another civil remedy," *Agency Holding Corp.*, 483 U.S. at 154, namely, private injunctive relief. *See* 116 Cong. Rec. 35,346 (1970) (statement of Rep. Poff) (Steiger amendment "does offer an additional civil remedy" and "prudence would dictate that the Judiciary Committee very carefully explore the potential consequences that this new remedy might have").[16]

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[16]Congress failed to enact legislation, proposed the very next term after the enactment of RICO, which was designed "to broaden even further the remedies available under RICO. In particular, it would have . . . permitted private actions for injunctive relief." *Agency Holding Corp.*, 483 U.S. at 155. *See also Sedima*, 741 F.2d at 489 n.20; 117 Cong. Rec. 46,386 (1971) (statement of Sen. McClellan) (Title IV of "Victims of Crime Act of 1972" would "authorize private injunctive relief from racketeering activity"); *id.* at 46,393 (text of bill proposing to amend RICO to add private injunctive remedy); *Victims of Crime: Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 3 (1970-1971) (text of proposed bill providing for private injunctive relief under RICO); *id.* at 51 (same); *id.* at 158 (statement

(continued...)

In sum, Congress repeatedly declined to authorize private injunctive relief under RICO. *See Russello*, 464 U.S. at 23-24 (citing "evolution of [RICO's] statutory provisions" as aid to statutory construction, and adding, "[w]here Congress includes [certain] language in an earlier version of the bill but deletes it prior to enactment, it may be presumed that the [omitted text] was not intended").[17]

C. The Counterarguments

In light of the foregoing, it is not surprising that virtually every court to address the issue has concluded that RICO does not authorize private parties to sue for injunctive relief. *See supra* note 13. Indeed, lower courts have frequently declared themselves *compelled* to reach this conclusion.[18]

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[16](...continued)
of Richard Velde, Associate Administrator, Law Enforcement Assistance Administration) (proposed legislation "would expand the available civil remedies. Section 1964 [of RICO] would be amended to permit any person to institute a civil proceeding to prevent or restrain violations . . . . Now only the United States can institute injunctive proceedings"); 118 Cong. Rec. 29,368 (1972) (text of "Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972" proposing *inter alia* to amend RICO to add private injunctive relief); *id.* at 29,370 (statement of Sen. McClellan) (bill "authorizes private injunctive relief from racketeering activity").

In 1973, Congress again considered, and failed to enact, a bill to amend RICO by adding private injunctive relief. *See* 119 Cong. Rec. 10,317-19 (1973) ("Civil Remedies for Victims of Racketeering Activity and Theft Act of 1973").

[17]The Seventh Circuit disparaged recourse to the legislative history of RICO. OR Pet. App. 14a-15a. But this Court has repeatedly invoked legislative history as a basis for limiting RICO. *E.g.*, *Holmes v. SIPC*, 503 U.S. 258, 267-68 (1992); *Reves v. Ernst & Young*, 507 U.S. 170, 179-83 (1993). In fact, as illustrated in the text *supra*, analysis of legislative history is characteristic of this Court's RICO jurisprudence.

[18]*See, e.g.*, *Wollersheim*, 796 F.2d at 1088 ("Taken together, the (continued...)

Only two district courts (aside from the courts below here) have held to the contrary.[19] One case preceded the extensive analysis in *Wollersheim* and has not been followed by any other court.[20] The other, while distancing itself from the Seventh Circuit's reasoning in this case, erroneously relied upon a presumed power of courts, *apart from RICO*, to grant equitable relief.[21] The district court [22] and court of appeals in the present case, meanwhile, offered no convincing analysis. Furthermore,

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[18](...continued)
legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO") (footnote omitted); *First Nat'l Bank and Trust Co. v. Hollingsworth*, 701 F. Supp. 701, 703 (W.D. Ark. 1988) ("it would be difficult, if not impossible, to draw a different conclusion"); *P.R.F., Inc. v. Philips Credit Corp.*, No. CIV 92-2266CCC, 1992 WL 385170 at *3 (D.P.R. Dec. 21, 1992) ("any other conclusion would not be reasonable").

[19]*See Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984); *Motorola Credit Corp. v. Uzan*, No. 02 Civ. 666, 2002 U.S. Dist. LEXIS 9118 (S.D.N.Y. May 21, 2002).

[20]Indeed, even later district court decisions in the same federal circuit (the Third) as the *Chambers* court, *supra* note 19, reached the opposite conclusion from *Chambers*, ruling that RICO does not provide for injunctive relief to private parties. *See Vietnam Veterans of America, Inc. v. Guerdon Indus., Inc.*, 644 F. Supp. 951, 960-61 (D. Del. 1986); *Curley v. Cumberland Farms Dairy, Inc.*, 728 F. Supp. 1123, 1137-38 (D.N.J. 1989).

[21]*Motorola Credit*, 2002 U.S. Dist. LEXIS 9118 at *6-*10. In effect, the *Motorola* court placed the burden on Congress explicitly to *deny* private injunctive relief to private parties, rather than following the rule that where Congress specifies certain remedies, they are normally deemed exclusive. *See supra* § I(A)(1).

[22]The district court provided virtually no analysis of the issue. *See* OR Pet. App. 131a-134a, 260a-262a. That court said that there was "substantial authority" for its position among the lower courts and declared itself "persuaded by the rationale in those opinions." *Id.* at 134a. But none of the cases the district court cited held that private parties can sue for injunctive relief under RICO. Indeed, several of the decisions the district court relied upon did not even involve RICO.

none of the arguments offered for reading into RICO a private injunctive remedy has merit.

1. The word "and"

It has been argued that the word "and" in RICO § 1964(c) provides a justification for private injunctive relief. The contention is that, because subsection (c) provides that any person injured in his business or property may sue "*and* shall recover" treble damages, instead of providing that any such person may sue "*to* recover" treble damages, that therefore the relief under subsection (c) is not limited to treble damages.

The Seventh Circuit embraced essentially this argument in support of its holding. The court read the word "and" as severing the first clause of subsection (c) from the remainder of that subsection. In effect, the Seventh Circuit read subsection (c) as if it were written as follows:

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court ~~and~~[. In addition to any other available remedies, such person] shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

See OR Pet. App. 10a. This "reconstruction" of RICO § 1964(c) is simply another version of the argument that the word "and," rather than linking the private cause of action with the treble damages remedy, instead justifies construing subsection (c) as a blanket authorization for private parties to institute civil RICO suits for both treble damages and all equitable relief identified in subsection (a).

This argument is deeply flawed.

First, this reading is "bizarre and wholly unconvincing as a matter of plain English and the normal use of language."[23] If Congress had intended to take such a significant step as authorizing private RICO suits for injunctive relief -- and the text and legislative history, discussed above, decidedly refute any such intent -- it would be truly "bizarre" for Congress to do so by such an obscure and indirect means when Congress could simply have said so in plain language.

Second, the identical term "and" appears, in an indistinguishable context, in the Sherman antitrust statute, *see supra* § I(A)(2), which this Court held does *not* authorize private suits for injunctive relief, *see Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917); *Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 67-68, 70-71 (1904). Moreover, the private treble damages provision of the Clayton antitrust act, 15 U.S.C. § 15, uses the term "and" in identical fashion. To read this word as implying that private litigants may also sue for injunctive relief would render the Clayton Act's separate, express authorization of private injunctive relief, 15 U.S.C. § 26, a meaningless redundancy.[24]

Third, the term "and," if anything, operates to *limit* the available relief to that explicitly set forth in RICO § 1964(c). Had that subsection merely authorized anyone injured in his business or property "to sue therefor," *period*, then there might be some ambiguity as to what relief would be available. But by spelling out that an injured person may sue "and recover threefold the damages he sustains," the statute leaves no doubt as to both the right and the remedy.

In short, the word "and" simply cannot bear the weight this argument places upon it.

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[23] *Kaushal*, 556 F. Supp. at 582. *Accord Sedima*, 741 F.2d at 489 n.20.

[24] *See Wollersheim*, 796 F.2d at 1087 & n.11; *Kaushal*, 556 F. Supp. at 583 & n.22; *Sedima*, 741 F.2d at 489 n.20; *DeMent*, 589 F. Supp. at 1382.

2. Subsection (a) as creating remedies

The argument has also been made that subsection 1964(a), which confers jurisdiction and authorizes certain remedies, should be read as creating remedies under RICO for both private parties and for the government. Under this reading, subsection (b) merely gives the government an *additional* right to equitable relief *pendente lite*, and subsection (c) merely gives private parties an *additional* right to treble damages, costs, and attorney fees. The Seventh Circuit appears to have embraced this argument. OR Pet. App. 9a-10a.

This argument is defective.

First, this argument ignores the explicitly *jurisdictional* nature of subsection (a) ("The district courts . . . shall have jurisdiction to . . ."). *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 576-77 (1979) (rejecting the argument that a jurisdictional provision in a statute can give rise to cause of action: "[t]he source of plaintiff's rights must be found . . . in the substantive provisions . . ., not in the jurisdictional provision"). While subsection (a) authorizes equitable relief, it does *not* -- as the Seventh Circuit conceded, OR Pet. App. 12a -- specify which plaintiffs can seek the remedies it provides. For the answer to that question, recourse must be had to subsection (b) ("The Attorney General may institute proceedings under this section."). Thus, the subsection (a) argument depends entirely upon the premise that subsection (c) grants private plaintiffs -- and not just the Attorney General -- *plenary* authority to "institute proceedings under this section," an argument refuted above. *Supra* §§ I(A)(1), (C)(1).

Second, this argument again ignores the parallels to antitrust law. The very statute which this Court held did *not* authorize private injunctive relief, *supra* § I(A)(2), also contained a broad jurisdictional provision with language largely identical to subsection 1964(a). *See Northern Securities*, 194 U.S. at 67

(quoting text of § 4).

The Seventh Circuit perceived (OR Pet. App. 11a) support for its reasoning in this Court's decision in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1990). But reliance on *Steel Co.* is puzzling. That case merely rejected the claim that a provision giving courts "jurisdiction in actions brought under [a subsection]" made every element of the pertinent substantive subsection "jurisdictional." *Id.* Petitioners made no such argument regarding RICO.

3. "Liberal construction"

Another argument the Seventh Circuit offered to justify reading into RICO a right of private injunctive relief is the legislative directive to construe RICO liberally to effectuate its purposes. OR Pet. App. 12a-13a. This argument is a make-weight.[25] As this Court has explained, "RICO's 'liberal construction' clause . . . is not an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). The meaning of RICO "must be gleaned from the statute through the normal means of interpretation." *Id.* at 184.[26]

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[25]The Seventh Circuit's invocation of the broad "underlying purposes" of RICO, OR Pet. App. 13a, is likewise no warrant for construing RICO contrary to its text and legislative history. "Our task here is not to determine what would further Congress's goal . . . but to determine what the words of the statute must fairly be understood to mean." *Holmes Group Inc. v. Vornado Air Circulation Sys., Inc.*, 122 S. Ct. 1889, 1895 (2002).

[26]As the Fifth Circuit observed:

> The "liberal construction" directive, however, neither compels nor authorizes us to disregard convincing evidence from the legislative history that Congress believed it had not approved private injunctive remedies and balked at doing so.

Fredeman, 843 F.2d at 830.

* * *

By in effect amending RICO to authorize private civil suits for injunctive relief, the Seventh Circuit has abolished the federal government's exclusive prerogative to seek such relief. Not only is this an affront to a unique federal executive power, it is an open invitation to abuse. Under the decision below, private parties are no longer limited to damages for the harm they suffered; they now can seek equitable relief wholly independent of, and potentially in conflict with, the decisions of the Attorney General regarding pursuit of such relief. Furthermore, private parties do not have the political accountability, or the duty to exercise prosecutorial discretion, that apply to the federal government. Under the Seventh Circuit's faulty interpretation, the RICO injunctive weapon can now be misused -- as in the present case -- as a means of waging political or commercial warfare against one's adversaries.

This Court should reverse the Seventh Circuit and hold that RICO does not authorize private injunctive relief.[27]

II. THE HOBBS ACT PREDICATES WERE DEFECTIVE.

NOW's case, the district court's rulings and jury charge, and the Seventh Circuit's affirmance of the judgment, each proceeded on a fundamentally flawed view of predicate extortion.

RICO requires proof of other, "predicate" offenses. The conduct at issue here does not constitute predicate extortion under the Hobbs Act. Consequently, NOW's civil RICO

[27]Hence, judgment must be entered against those respondents which obtained only injunctive relief, namely, NOW, those members represented by NOW, and all of the plaintiff class members.

judgment resting upon, *inter alia*, Hobbs Act predicates, must be reversed.

Each subsection of RICO requires proof of a "pattern of racketeering activity." 18 U.S.C. § 1962(b), (c). A "pattern" of racketeering activity "requires at least two acts of racketeering activity," *id.* § 1961(5). The necessary acts of racketeering must in turn come within RICO's definition of "racketeering activity," *id.* § 1961(1), which lists the specific offenses that qualify as predicate acts for RICO. Thus, a RICO plaintiff must allege and prove at least two "predicate acts" that fall within the RICO definition of "racketeering activity" and form a "pattern."

Not every crime qualifies as a predicate offense supporting a RICO claim. For example, the list of predicate crimes, 18 U.S.C. § 1961(1), does *not* include trespass, disorderly conduct, obstruction of public passages, vandalism, harassment, resisting arrest, contempt of court, assault, battery, or even rioting, *id.* In other words, RICO excludes from its coverage precisely those offenses most likely to arise in the context of political or social protest. This is no coincidence: Congress adopted an enumerated list of predicate offenses in response to concern that RICO, if drafted more generally, could be used as a weapon against protesters who engaged in unlawful demonstration activity. Note, *Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 Notre Dame L. Rev. 691, 697-99 (1999) (documenting evolution of RICO in response to concern over potential application to protesters).

Faced with a statute that does not lend itself to use against protesters, NOW nevertheless sought to shoehorn this case into RICO on the theory that coercive protesting is a form of "extortion." NOW pursued, and went to trial on, the theory that petitioners committed predicate acts of "extortion" under federal law (Hobbs Act, 18 U.S.C. § 1951(a), (b)(2), and Travel Act, 18 U.S.C. § 1952) and the law of the state where the act

was committed. NOW's theory essentially was that any unlawful act which interfered with access to, or the provision of, abortion, made someone "give up" a right and therefore constituted "extortion" under federal and state law. *E.g.*, Tr. 550, 564-67, 4327-28, 4335-37, 4874-75, 4961, 4983-87, 4989, 5003-11, 5016, 5037, 5118. Petitioners objected[28] to NOW's construction of the extortion laws at many points in the case: dismissal motions, summary judgment, Rule 50 motions at the close of NOW's case and at the close of all evidence, the jury instructions, and post-trial motions. The district court at each point rejected petitioners' objections and embraced NOW's theory of extortion. *See* OR Pet. App. 108a-114a (finding Hobbs Act violations sufficiently pled);[29] *id.* at 121a-129a (Travel Act and state extortion sufficiently pled); *id.* at 194a-199a (evidence of interference with abortion suffices to defeat summary judgment on Hobbs Act); Tr. 2462, 4880, 4903 (Rule 50); Tr. 4944-48 (jury charge); OR Pet. App. 275a-276a (post-trial motions). *See also, e.g.*, Tr. 4332, 4339-40, 4884-85. The jury returned a verdict for respondents, finding that over two dozen acts of "extortion" had been committed. OR Pet. App. 311a-312a. *See supra* note 9.

NOW sought to prove that petitioners and others associated with the Pro-Life Action Network did something illegal which interfered with the practice of abortion. The Seventh Circuit equated this with extortion and racketeering. Under this approach, virtually *any unlawful activity designed to change anyone's conduct could be extortion.* This erroneous view of extortion would sweep within its definition any protest activity that crosses the line from legal to illegal activity. Sit-ins at

[28] *See supra* note 4.

[29] The district court stated: "If Plaintiffs have alleged that they have sustained economic losses resulting from Defendants' actions, that is sufficient to withstand this motion to dismiss." *Id.* at 110a (footnote omitted).

segregated lunch counters, chaining oneself to a redwood tree scheduled to be cut down, blocking the entrance to an auditorium where a hatemonger is speaking, interference with access to a pornography business -- all of these could be "extortionate" under the decision below. NOW essentially admitted as much. *See* Tr. 4963 (closing argument for respondents) (RICO enterprise "could be an animal rights group that bars entry to a restaurant that serves veal"). The district court likewise recognized that RICO might have been used to wipe out "civil rights actions, demonstrations in the '60s or anti-war demonstrations in the '70s." Tr. 4339-40. *Accord* OR Pet. App. 158a ("The instant case is paradigmatic of RICO's seemingly unlimited applicability").

In short, *any unlawful protest activity* would, under the rationale of the Seventh Circuit, constitute felony extortion. More than one such illegal act could trigger a civil RICO suit, with extortion serving as the predicate.

This is not mere speculation. Civil RICO is already being invoked against protesters of various political stripes. *See, e.g., Oversight Hearing Addressing the Civil Application of the Racketeering Influenced and Corrupt Organization Act (RICO) to Nonviolent Advocacy Groups, Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. (1998) (www.house.gov/judiciary/35055.htm) (testimony of Jeffrey S. Kerr, General Counsel, People for the Ethical Treatment of Animals) (civil RICO suit filed against anti-vivisection protesters); *Stephens Group, Inc. v. Voices for Animals*, No. 00:5518 (JEI) (D.N.J. First Amended and Supplemental Complaint filed Apr. 17, 2001) (laboratory and its shareholder adding civil RICO claims against animal rights groups); *Jacques Ferber, Inc. v. Bateman*, No. 99-CV-2277 (E.D. Pa. filed May 3, 1999) (civil RICO suit filed against anti-fur protesters); "Furrier files RICO Suit to Halt Anti-Fur Protesters' Excesses," 15 Civil RICO Litigation Rptr. No. 9, p.

3 (May 1999) (same); "Furriers file a RICO suit over animal rights projects." The Star-Ledger, Aug. 6, 1999 (federal civil RICO suit filed in Newark, New Jersey, against animal rights groups).[30]

Social protest has a long and revered history in this nation. From the burning or hanging of effigies in colonial times, to the temperance activists' disruption of taverns, to the civil rights and anti-war sit-ins of the 1960's and 1970's, demonstrations -- even illegal ones -- have been both an outlet for dissent and an instrument for social and legal change. In totalitarian regimes, demonstrators are crushed by tanks. In this nation, by contrast, protesters may be arrested, fined, or jailed for offenses they commit, but they are not treated like hardcore criminals -- unless the Seventh Circuit's misreading of the Hobbs Act stands.

Happily, a proper reading of RICO and federal (and state) extortion laws requires rejection of the Seventh Circuit's view of predicate extortion.

A. Distortion of Hobbs Act Extortion

The Hobbs Act, 18 U.S.C. § 1951, prohibits interference with commerce by "extortion," § 1951(a), and defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." § 1951(b)(2). A claim of Hobbs Act extortion fails if any of these statutory elements

[30]The fact that the cited cases were filed in district courts within the Third Circuit is no coincidence. In *Northeast Women's Center Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), the Third Circuit became the first federal appeals court to endorse the use of RICO against protesters under a theory of Hobbs Act extortion. The Seventh Circuit's adoption of a similarly distorted view of federal extortion in the present case will, unless corrected by this Court, doubtless produce its own clones.

is lacking. In this case, NOW failed to allege or prove "the obtaining of property," "with his consent," and "wrongful use of actual or threatened force, violence or fear."

1. Missing elements of Hobbs Act extortion

a. No "obtaining"

Violation of the Hobbs Act requires "the *obtaining* of property *from* another . . . ." 18 U.S.C. § 1951(b)(2) (emphasis added). The Seventh Circuit failed to require NOW to prove any such "obtaining" in this case. According to the Seventh Circuit, despite the text of § 1951, an "extortionist" can "violate the Hobbs Act without either seeking or receiving money or anything else," OR Pet. App. 36a. "A loss to, or interference with the rights of, the victim is all that is required." *Id.*[31] Thus, any protest activity that crosses into tortious or illegal behavior (a trespass, an obstruction, an instance of physical contact) would subject the actor to federal criminal felony liability as an "extortionist" under the Hobbs Act and a "racketeer" (if two or more acts are involved) under RICO. A recipe more deadly for social protest could scarcely be imagined.

The Seventh Circuit's decision also creates considerable mischief for government actors. The Hobbs Act proscribes the extortionate "obtaining of property . . . under color of official right." § 1951(b)(2). Under the decision below, this means "[causing a] loss to, or interfer[ing] with the rights of, the victim," OR Pet. App. 36a, under color of official right. Thus, any police misconduct (false arrest, excessive force, etc.) or other act of government officials (e.g., withholding a municipal permit for a pornography business or gun store) that interferes with someone's rights, would become federal criminal extortion

[31]The court below claimed support in "a long line of precedent," *id.*, but the "precedent" is merely lower court dicta. *See generally* Note, *supra* p. 25, at 718-19 & n.124.

and racketeering.

The decision below creates mischief for federal robbery law as well. The "robbery" section of the Hobbs Act also uses the term "obtaining": "robbery" is the "taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury . . .," 18 U.S.C. § 1951(b)(1). Under the Seventh Circuit's distorted view of "obtaining," a protester who pushes someone to the ground, causing that person's pants to tear or glasses to break, commits "robbery" ("obtaining" the pants or glasses by actual force). The bumping of opposing demonstrators would become the stuff of felony prosecutions and civil RICO suits.[32]

The Seventh Circuit's rewriting of the Hobbs Act does *not* square with the law and is simply wrong. As this Court has clearly held, the "obtaining" of property requires the *acquisition of*, and not mere injury or interference with, property. For example, in *United States v. Enmons*, 410 U.S. 396 (1973), the defendants wrongfully caused property losses and interfered with rights, *id.* at 398 (recounting acts of violence); *id.* at 399 ("wrongful violence" is redundant), yet there was no extortion: the defendants did not wrongfully *obtain property*, *id.* at 399-400. *See id.* at 400 (distinguishing the obtaining of "personal payoffs"); *id.* at 406 n.16 (distinguishing "obtaining a financial benefit for himself" and a "payoff": the "entire character [of the demonstration] changed . . . when it was used as a pressure device *to exact the payment of money*") (emphasis added). *See*

[32]The decision below would also wreak havoc in the interpretation of other federal statutes that have the obtaining of property as an element. *E.g.*, 10 U.S.C. § 921 (larceny and wrongful appropriation under Uniform Code of Military Justice); 11 U.S.C. § 727(a)(4)(C) (bankruptcy discharge); 15 U.S.C. § 77q(a)(2) (fraudulent interstate transactions); 15 U.S.C. § 1703(a)(2)(B) (fraud in land transactions); 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud).

also Evans v. United States, 504 U.S. 255, 259-60 (1992) (common law, from which Hobbs Act borrowed, required that public official "took . . . money" under color of his office in order to constitute extortion).

The result in *Enmons* would have to be different under the rationale of the decision below. Indeed, the Seventh Circuit's distorted view of Hobbs Act extortion is radically at odds with both the majority *and the dissent* in *Enmons*.

In *Enmons*, the question was whether the Hobbs Act applied to labor violence in support of higher wages and other employee benefits. This Court divided 5-4 over the question, with the majority holding that "the use of violence to achieve legitimate union objectives" was not the "wrongful" obtaining of property for purposes of Hobbs Act extortion. 410 U.S. at 400. *See infra* §II(A)(1)(e). But not a single Justice suggested that the violent destruction of property that had occurred in that case could itself qualify as the extortionate "obtaining" of property under the Hobbs Act. Yet the Seventh Circuit endorsed precisely such a theory.

The decision below would plainly nullify the holding in *Enmons*. Instead of prosecuting violent union protesters for the extortionate obtaining of better wages and benefits (an "obtaining" that, under *Enmons*, is not "wrongful"), prosecutors -- under the Seventh Circuit's faulty rationale -- could simply charge the protesters with extortionate "obtaining" of the property or rights damaged or interfered with, i.e., by causing a "loss to, or interfering with the rights of" (OR Pet. App. 36a) others. The "obtaining of property" element would be satisfied by the damage to transformers (as in *Enmons*) or to other company property, or by interference with the liberty of management or employees, for example, to cross the strike line. The legitimacy or wrongfulness of the ultimate *aim* of "obtaining wages" would be irrelevant, because the unlawful *means* of "obtaining, by damage of or interference with,

property," according to the court below, would satisfy the Hobbs Act.

The rationale of the decision below would thus render meaningless the entire debate in *Enmons*. Whether obtaining higher wages is "wrongful" or not under the Hobbs Act is wholly beside the point if wrongful "obtaining property" (as opposed to wrongful "causing a loss" or "interfering with rights") is not even a necessary element of Hobbs Act extortion.[33]

The *Enmons* majority was insistent that the Hobbs Act would not proscribe misconduct on a picket line, even a physical assault. 410 U.S. at 404-05. The dissent was even more emphatic, dismissing as "nonsense" the notion that a "fistfight on a picket line" could violate the Hobbs Act. *Id.* at 418 n.17 (Douglas, J., dissenting). Yet in the present case it was precisely demonstration misconduct -- the nonviolent sit-ins themselves, plus several scattered[34] incidents of alleged violence[35] -- that formed the very core of both respondents' case and the jury's verdict, as well as the basis for the Seventh Circuit's affirmance under the Hobbs Act. *Supra* pp. 4-5 & nn. 7-10; OR Pet. App. 1a-2a, 23a, 35a-36a.

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[33]The potential for businesses to use RICO actions based on an expansive concept of Hobbs Act extortion against union activists has not gone unnoticed by judges and commentators. *See* OR Resp. at 4 n.2.

[34]A comparison with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), is instructive. In *Claiborne*, there were at least ten violent incidents in one county of Mississippi over a seven-year period. *Id.* at 888, 893, 898, 904-06, 920. In the present case, the jury found only four acts or threats of violence, OR Pet. at 4 n.5, in the context of nationwide demonstrations over a fourteen-year period, *id.* at 6-7. This Court described the violent acts in *Claiborne* as "isolated," 458 U.S. at 924, and "relatively few," *id.* at 933. *A fortiori*, the same is true here.

[35]Petitioners vigorously deny any charge of violence. *Supra* p. 2 & n.2. Indeed, OR demanded all "rescue" demonstration participants to sign a pledge of nonviolence. *Id.*

i. Plain meaning of "obtaining"

Interpretation must begin with the text of the statute. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Words are to be given their ordinary meaning. *Russello v. United States*, 464 U.S. 16, 21 (1983). "Obtain" means "to come into the possession or enjoyment of (something) . . . to acquire [or] get." *Oxford English Dictionary*, vol. 10, at 669-70 (2d ed. 1989). *Accord Black's Law Dictionary* 972 (5th ed. 1979) ("obtain" means "[t]o get hold of . . . ; to get possession of; to procure; to acquire in any way"). "Obtaining . . . from" is not synonymous with "part with," which means "to let go, *give up* [or] surrender." *Oxford English Dictionary*, vol. 11, at 262 (emphasis added).

The plain meaning of "obtaining . . . from" thus includes more than merely making someone "lose" or "give up" something. *Evans*, 504 U.S. at 264-65, 268 (equating "obtain" with "receive"). *See generally* Note, *supra* p. 25, at 704-12 (tracing extortion from the common law through the Hobbs Act and concluding that extortionate "obtaining" requires not only that a victim be deprived of property, but also that someone get the property as a result of the deprivation).

ii. Meaning of "obtaining" under New York extortion law

Under New York law -- the source of the language of the Hobbs Act -- "obtaining" means "gaining," not just "denying." *Enmons*, 410 U.S. at 406 n.16 (1973).

The Hobbs Act took its relevant language from the extortion law of New York. *Id.*; *Evans*, 504 U.S. at 261 n.9, 264-65. Under New York law, it is well-settled that the crime of extortion requires an unlawful taking. *Enmons*, 410 U.S. at 406 n.16 (under New York statute, "extortion requires an intent to *obtain* that which in justice and equity the party is not entitled

to *receive*"; accused must be "actuated by the purpose of *obtaining a financial benefit*" such as "*receiv[ing]* a payoff") (emphasis added; quoting and citing New York cases). *See People v. Whaley*, 6 Cow. 661, 663 (N.Y. 1827) ("[e]xtortion . . . signifies the taking of money" with corrupt intent) (cited in commentary to Field Code of 1865, § 613 (extortion)); *People v. Ryan*, 232 N.Y. 234, 236, 133 N.E. 572, 573 (1921) (blackmail prosecution) (an intent "to extort" requires an accompanying intent to "gain money or property"; mere threat to injure a business is insufficient). *See also People v. Squillante*, 18 Misc. 2d 561, 564, 185 N.Y.S.2d 357, 361 (Sup. Ct. 1959) ("'[o]btaining of property from another' imports not only that he give up something but that the obtainer receive something"); *United States v. Nedley*, 255 F.2d 350, 355-58 (3d Cir. 1958).[36]

New York law was codified in the Field Code of 1865, which defined extortion as "[t]he *obtaining of property* from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." Field Code § 613 (1865) (emphasis added). The commentary explained:

> Four of the crimes affecting property require to be somewhat carefully distinguished; robbery, larceny, extortion, and embezzlement . . . . *All four include the criminal acquisition of the property of another*. . . . In extortion, there is again a taking . . . . Thus extortion partakes in an inferior degree of the nature of robbery, and embezzlement shares that of larceny.

[36]In *Nedley*, the Third Circuit squarely held, in accord with New York law, that "obtaining" was synonymous with "taking" and that "robbery" in the Hobbs Act did not extend to "interference by force and violence with . . . lawful dominion and control," since no "taking" or no "intent to steal" could be shown. 255 F.2d at 354-57. The same term "obtaining" is used in the extortion subsection.

Field Code, Chapter IV, § 584 com. (emphasis added). The Field Code, in turn, was one of the sources for the Hobbs Act. *Evans*, 504 U.S. at 261 n.9.

iii. "Obtaining" at common law: extortion vs. coercion

Furthermore, the elimination of the "obtaining" element of "extortion" is completely inconsistent with the distinction at common law -- incorporated into the Hobbs Act -- between "extortion" and "coercion." "Coercion" is not a predicate act under RICO. 18 U.S.C. § 1961(1)(A). *See, e.g., United States v. Delano*, 55 F.3d 720, 726 (2d Cir. 1995). (NOW concedes that "mere coercion" is insufficient to satisfy the elements of extortion. Opp. at 16.) To read the Hobbs Act to include "coercion" would expand RICO beyond its statutory limits.

"Coercion" is the criminal compulsion of another, by means of threats, to do or not do something. *See* 31A Am. Jur. 2d *Extortion, Blackmail, and Threats* §§ 49-50 (1989) (coercion as independent offense). Coercion is a creature of statute, much broader than extortion. *Id.* Extortion, by contrast, is limited to the *obtaining of property* by means of threat. *Id.* § 40. The "obtaining" element in the Hobbs Act incorporates this distinction.

"[A] statutory term is generally presumed to have its common-law meaning." *Taylor v. United States*, 495 U.S. 575, 592 (1990). Indeed,

> "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as

satisfaction with widely accepted definitions. not as a departure from them."

Evans, 504 U.S. at 259-60 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)). *Evans* explicitly applied this rule to the terms of the Hobbs Act: "our construction of the statute is informed by the common-law tradition from which the term of art was drawn and understood." 504 U.S. at 268. This "common-law tradition" demonstrates the flaw in the Seventh Circuit's failure to respect the distinction between extortion and coercion.

(a). Extortion at common law

At common law, extortion unquestionably required an *acquisition* of *property*. *See* 4 W. Blackstone,[37] *Commentaries* *141 (extortion as "an abuse of public justice, which consists in any officer's unlawfully *taking*, by colour of his office, from any man, *any money or thing of value*, that is not due to him, or more than is due, or before it is due") (emphasis added); 3 E. Coke, *First Institute* 584 (J. Thomas ed. 1826) ("[e]xtortion, in its proper sense, is a great misprision, by wresting or unlawfully *taking* by any officer, by colour of his office, *any money or valuable thing* . . . either that is not due, or more than is due, or before it be due") (emphasis added).

> [E]xtortion in a large sense signifies any oppression under colour of right; but . . . in a strict sense, it signifies the *taking of money* by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.

[37] "The definition of common law extortion that writers on the Hobbs Act most frequently cite is Blackstone's . . . ." Lindgren, *The Elusive Distinction Between Bribery and Extortion: from the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815, 862 (1988).

W. Hawkins,[38] *A Treatise of the Pleas of the Crown* 316 (6th ed. 1788) (emphasis added). The Hobbs Act, by employing the term "obtaining" from common law, New York law, and the Field Code, incorporated this same requirement of an *acquisition of property*.

(b). Statutory distinction between extortion and coercion

The Model Penal Code maintained the distinction between the (originally statutory) crime of coercion and the (originally common-law) crime of extortion. Coercion appears in Section 212.5, which "prohibits specified categories of threats made with the purpose of unlawfully *restricting another's freedom of action* to his detriment." Model Penal Code § 212.5 cmt. 2 at 264 (1980) (emphasis added). Extortion, by contrast, appears in Section 223.4, which "deals with situations where threat rather than force . . . is the method employed to deprive the victim of his *property*." *Id.* § 223.4 cmt. 1 at 201-02 (emphasis added). As in the Hobbs Act, the Model Penal Code defines extortion to require that one "obtains property of another," *id.* § 223.4, and to "obtain" property means "to bring about a transfer . . . of a legal interest in the property, whether to the obtainer or another," *id.* § 223.0(5) (definitions). The obtaining of property thus distinguishes extortion from coercion, as coercion involves the restriction of another's freedom of action by threat. *Id.* § 212.5 cmt. 2 at 266; *id.* § 223.4 cmt. 1 at 203.

Many states follow the Model Penal Code and distinguish extortion and coercion by categorizing them as separate

[38] "Hawkins's definition of extortion was cited, paraphrased, or followed by the *Crown Circuit Companion*, Mathew Bacon in *A New Abridgement of the Law*, William Russell in *A Treatise on Crimes and Misdemeanors*, and Francis Wharton in his influential American treatise, *A Treatise on the Criminal Law*." Lindgren, *supra* note 37, at 865 (footnotes omitted).

statutory offenses. Blakey & Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability (Under RICO)*, 33 Am. Crim. L. Rev. 1345, 1660 n.25 (1996) (collecting statutes). Other states recognize only the crime of extortion, not coercion. *Id.* at 1660 n.26. Still other states combine the two offenses under one heading. *Id.* at 1660 n.27.

The Seventh Circuit failed to recognize coercion as a separate offense. Yet "[t]he distinction is not trivial: . . . it is of the essence of extortion -- not only in New York law but, more importantly, in the law generally -- that one compel another to surrender *property*." *United States v. Private Sanitation Indus. Ass'n*, 793 F. Supp. 1114, 1132 (E.D.N.Y. 1992) (emphasis in original) (citing *United States v. Nardello*, 393 U.S. 286, 296 (1969)).

Unlawful acts of protest, like any unlawful acts, may in some sense "deprive" others of something. But "to deprive" is simply not the same as "to obtain from." Petitioners here were not business competitors of the abortion facilities or their employees. They stood to gain nothing by the reduction in the abortionists' business. Even assuming, *arguendo*, that abortion businesses lost "property" because of petitioners, *but see infra* § II(A)(1)(b), neither the petitioners nor anyone associated with them *obtained* that "property."[39]

[39]The Third Circuit holding in the *McMonagle* case, *supra* note 30, that no economic benefit or motivation is necessary in pleading and proving a Hobbs Act violation, is clearly wrong. None of the decisions it cited supports its holding. *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980), merely held that the extortionist need not obtain the property himself -- a political party may be the recipient of the extorted contributions. *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975), held that a religious purpose does not preclude a finding of extortion where money is taken. Finally, *United States v. Anderson*, 716 F.2d 446 (continued...)

A defendant may "obtain" property for purposes of the Hobbs Act either by *personally* receiving a direct payment from the victim or by obtaining property for *another* person. *United States v. Green*, 350 U.S. 415 (1956). In the case at bar, however, neither the district court nor the Seventh Circuit required proof of either alternative.

The antiwar protester who gets in a shoving match with a counter-demonstrator may be guilty of battery, but he is not guilty of extortion: the protester *obtains no property*. Nor do other incidents of misconduct at protests, or even deliberate civil disobedience, rise to the level of Hobbs Act extortion *unless the perpetrator "obtains" or tries to "obtain" property*. As this Court has observed, the "entire character" of a protest "change[s] from legality to criminality" when the protest is used "to exact the payment of money as a condition of its cessation." *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973) (editing marks and citation omitted).

b. No "property"

Hobbs Act extortion requires "the obtaining of *property*," 18 U.S.C. § 1951(b)(2) (emphasis added). Petitioners did not "obtain" any tangible property of respondents. Tr. 4327. Nor is there any claim that defendants "obtained" intangible property like shares of stock or copyrights. Reliance on intangible rights -- such as a "right to abortion" or a "right to perform abortion

[39](...continued)
(7th Cir. 1983), dealt not with the "obtaining from" element of extortion, but with the effect of threats on interstate commerce. The record included evidence that defendant had extorted $300 from the victim. *Id.* at 447. Curiously, the Third Circuit failed to cite its own controlling precedent recognizing that extortion under the Hobbs Act is a "larceny-type offense." *United States v. Sweeney*, 262 F.2d 272, 275 (3d Cir. 1959) (citing *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958)). *McMonagle*, in short, is unpersuasive.

services," Tr. 567 (NOW's opening statement of what was "extorted") -- must fail. Such intangible liberty interests do not constitute "property" for purposes of the Hobbs Act.[40]

Any unlawful conduct, whether a tort, a breach of contract, or even a parking violation, will interfere to some degree with another person's liberty. But the Hobbs Act forbids the wrongful obtaining of *property* (extortion), not the wrongful denial of *liberty* (coercion). To treat "rights" as "property" under the Hobbs Act would be to remove all limits whatsoever on the kind of injury necessary for federal criminal extortion.

This Court has repeatedly distinguished between "property," on the one hand, and "intangible rights," on the other, when construing the "obtaining property" element of federal criminal statutes. *E.g.*, *McNally v. United States*, 483 U.S. 350, 356, 358, 360 (1987); *Cleveland v. United States*, 531 U.S. 12, 23-24 (2000).

McNally is illustrative. The statute at issue there prohibited use of the mails for "obtaining money or property" by fraud. 483 U.S. at 352 n.1. The government charged the defendant with defrauding Kentucky citizens "of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud," *id.* at 354 n.4 (trial court's instruction to jury). This Court recognized an obvious

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[40]The jury was instructed that "property rights" included

> anything of value, including a woman's right to seek medical services from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion and fear.

JA 136. *See also* JA 143 (verdict form lumping together extortion of patients, prospective patients, and abortion staff). Hence, the judgment cannot be sustained unless each of these intangible rights qualifies as "property" under the Hobbs Act.

difference between "property rights" and "the intangible right of the citizenry to good government." *Id.* at 356. Indeed, this distinction was so clear that the Court considered that the only "arguable" way of saving the prosecution would be to construe the mail fraud statute so as to dispense entirely with "the money-or-property requirement" for certain kinds of fraudulent schemes. *Id.* at 358. This Court refused to remove this statutory limitation: "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read [the mail fraud statute] as limited in scope to the protection of property rights." *Id.* at 360.

Acceptance of intangible "rights" as property would likewise leave the boundaries of the Hobbs Act ambiguous and would put the federal government (and civil RICO plaintiffs) in the business of "setting standards" in protest movements. Did the civil rights activists of the 1960's extort owners of diners of "property" when they obstructed the owners' "right to serve only the customers they chose"? Did these activists extort white bus passengers of their "property" by making these passengers give up their "right to sit in the front of the bus"? Certainly not. "Liberty" does not equal "property" under the Hobbs Act.

NOW's claim requires stretching the Hobbs Act even beyond protection of intangible property. *Cf. Carpenter v. United States*, 484 U.S. 19, 25-27 (1987) (wrongful obtaining of intangible property). "Intangible *property*" (such as shares in a corporation or trademark rights) does not equate with "intangible *rights*." A liberty interest such as the "right to provide services" or the "right to make business decisions" is, in the words of *Carpenter*, "an interest too ethereal in itself to fall within the protection" of the "property" concept, *id.* at 25.

The Seventh Circuit's essentially limitless theory of property rights, like the prosecution theories in *Cleveland*, must be

rejected "not simply because they stray from traditional concepts of property," 531 U.S. at 24, but also because this approach "invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress," *id.* This Court warned in *Cleveland* that a novel expansion of the statutory term "property" "would subject to federal . . . prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id.* The same concern applies here. *Infra* § II(A)(2)(b).

Invoking the rule of lenity, this Court noted in *Cleveland* that any ambiguity about the term "property" must be resolved in favor of a less expansive meaning. 531 U.S. at 25. Highly apropos of the present case, this Court found the rule of lenity "especially appropriate" in construing a federal crime which "is a predicate offense under RICO." *id. Accord infra* § II(A)(2)(c).

c. No "consent"

The Hobbs Act requires proof of the "consent" of the victim. NOW has shown no such extraction of consent.

Protest activity inherently seeks changed conduct on the part of others. But the Hobbs Act does not proscribe "the securing of altered behavior by another with his consent," but rather "the obtaining of property from another, with his consent," 18 U.S.C. § 1951(b)(2). Thus, the "consent" extracted must be linked to the obtaining of property. The mere pressuring of others to "consent" to stop obtaining or providing abortions is irrelevant, as petitioners did not "obtain" that conduct (even if such "conduct" were "property").

Moreover, damage to or interference with property is not the same as extortion because the consent of the victim is irrelevant. The purpose of the vandal or tortfeasor is not to obtain permission for anything.

Any unlawful activity exerts pressure on those who wish to avoid the consequences of that activity. Any property damage

"forces" the owner to replace, repair, or endure the impairment of property. But the Hobbs Act does not outlaw the universe of wrongful conduct: the deliberate seeking of the *consensual* surrendering, to the extortionist or his designee, of property that the extortionist obtains, remains a critical element of this statutory offense.

d. No "force, violence, or fear"

Conduct typical of civil disobedience -- sit-ins, pickets, vehement rhetoric, pouring blood or paint on property or things, damaging weapons components -- does not constitute "force, violence, or fear" under the Hobbs Act. The judgment below, however, rests largely upon precisely such nonviolent protest activity. *Supra* pp. 4-5 & nn.7-10. Hence, the verdict of predicate extortion must fall. *See Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 102 (2d Cir. 1990) ("it would be difficult to construe the [anti-abortion rescuers'] activities as described in the complaint, consisting of resistance to police efforts to clear protestors from the [abortion business] . . ., as the 'wrongful use of actual or threatened force, violence or fear' within the meaning of section 1951(b)"). As the sponsor of the Hobbs Act noted, the words "robbery" and "extortion" "have been construed a thousand times by the courts. Everybody knows what they mean." 91 Cong. Rec. 11,912 (1945) (quoted in *United States v. Culbert*, 435 U.S. 371, 378 (1978)). Plaintiffs' artificial and unbounded construction of the Hobbs Act, like the prosecutor's attempted expansive reading of that same Act in *McCormick v. United States*, 500 U.S. 257, 272 (1991), is "an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent . . . ."

For forty years after the passage of the Hobbs Act, not a single reported decision suggested that the pursuit of social, moral, or political goals through pressure tactics -- including

lawbreaking in the form of trespass, vandalism, obstruction, mass picketing, and incidental scuffling -- constitutes federal criminal extortion. One novel and aberrant appellate decision, *see supra* note 30, cannot have singlehandedly revolutionized American jurisprudence.

Civil disobedience and social or political pressure tactics are part of the American experience. Characterizing ideological movements as extortionate simply because of the use of these traditional methods would move this country toward totalitarian oppression of dissent. The Seventh Circuit's theory would make an extortionist out of everyone from Gandhi, to Martin Luther King, Jr., to the temperance activists of the Nineteenth Century, to the leaders of the Boston Tea Party, and would convert the Hobbs Act into a weapon for combatting anti-nuclear protesters and animal rights activists. But as the Ninth Circuit declared in *United States v. Caldes*, 457 F.2d 74 (9th Cir. 1972) (cited with approval in *Enmons*, 410 U.S. at 409), "it appears to us that acts of vandalism of the type committed by these [defendants] would be more properly and suitably prosecuted in the state courts and it is doubtful if Congress intended by Section 1951 to elevate this type of conduct to the level of the federal court." 457 F.2d at 79 (citing *United States v. Bass*, 404 U.S. 336 (1971)).

e. No "wrongful" purpose

Hobbs Act extortion requires the "wrongful" use of actual or threatened force, violence, or fear. § 1951(b)(2). The "wrongfulness" in question must be the wrongfulness of the *goal* or *purpose* of the conduct, not the wrongfulness of the *means*. *United States v. Enmons*, 410 U.S. 396 (1973).

In *Enmons*, striking employees seeking higher wages and benefits committed serious acts of property damage: "firing high-powered rifles at three Company transformers, draining the oil from a Company transformer, and blowing up a transformer

substation owned by the Company." *Id.* at 398. This Court affirmed the dismissal of a Hobbs Act indictment. *Id.* at 398, 412.

In *Enmons*, the government argued that the "wrongfulness" element was satisfied by the property destruction. This Court disagreed:

> The term "wrongful," which on the face of the statute modifies the use of each of the enumerated means of obtaining property -- actual or threatened force, violence, or fear -- would be superfluous if it only served to describe the means used. For it would be redundant to speak of "wrongful violence" or "wrongful force" since, as the Government acknowledges, any violence or force to obtain property is "wrongful."

Id. at 399-400 (footnotes omitted). Rather, the wrongfulness must attach to the *objective* of the conduct:

> [T]he literal language of the statute will not bear the Government's semantic argument that the Hobbs Act reaches the use of violence to achieve *legitimate* union *objectives*, such as higher wages in return for genuine services which the employer seeks. In that type of case, there has been no "wrongful" taking of the employer's property . . . .

Id. at 400 (emphasis added). "In short, when the *objectives* of the [protest activities] change[] from legitimate . . . ends to personal payoffs, then the actions bec[o]me extortionate." *Id.* at 406 n.16 (emphasis added).

No language in the Hobbs Act refers in any way to unions or labor. Hence, the principle of *Enmons* cannot arbitrarily be confined to the labor context. In the present case, petitioners' objective was to stop abortion. As respondents concede, Tr. 4315, this is a legitimate objective, even if some of petitioners' means were unlawful. *Bray v. Alexandria Women's Health*

Clinic, 506 U.S. 263, 270, 274 (1993). "Whether one agrees or disagrees with the goal of preventing abortion, that goal . . . is proper and reasonable . . . ." *Id.* at 274. Hence, under *Enmons*, the "wrongfulness" element was lacking.

2. Rules of statutory construction

The Seventh Circuit's theory of Hobbs Act extortion profoundly contradicts several well-established norms of statutory construction.

a. Avoiding constitutional difficulties

Legislation ought not, if a reasonable alternative is present, be interpreted in a manner that raises constitutional difficulties. *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991). This rule of construction mandates fidelity to all of the elements of Hobbs Act extortion -- including the elements missing from petitioners' conduct. To apply the Hobbs Act to cover social protest activities would raise serious First Amendment and due process difficulties.

First, the right to free speech shelters a broad range of expressive activity, including that which many people might find offensive, coercive, and disruptive. *E.g.*, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (pressuring real estate broker to cease certain practices); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (boycotts enforced through public embarrassment); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (attacking religious beliefs). Even when protest activity inflicts economic injury, it does not thereby become unlawful. *Claiborne Hardware*; *Thornhill v. Alabama*, 310 U.S. 88 (1940). Yet the Seventh Circuit's theory of extortion threatens "coercive" expression. Moreover, the threat of extortion prosecutions and RICO suits for any coercive conduct (even conduct of someone merely "associated" with the "enterprise") exerts a profound "chilling effect" on legitimate free speech

activities.

Second, the *post hoc* categorization of traditional protest methods as "extortionate" poses due process issues of unfair surprise. *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (unconstitutional to subject "sit-in" to unforeseeable expansion of criminal law). It would be difficult to overstate the novelty -- and bizarre nature -- of the Seventh Circuit's view that "interference with rights" equals the extortionate "obtaining of property." No state or federal criminal extortion charges were brought for *any* of the dozens of supposedly "extortionate" sit-ins or other acts on which the RICO claim was based. *See, e.g.*, Tr. 1777-78 (Lt. Pyrdum); RICO Case Statement [Amended] (Oct. 31, 1994) at 5-6, Ex. A, B (listing criminal charges/convictions for alleged predicate acts, none of which are for "extortion"). Indeed, it would be "an unprecedented feat of interpretative necromancy," *Holmes Group*, 122. S. Ct. at 1895, for a prosecutor to charge that a sit-in protest was felony "extortion," yet that was precisely the Seventh Circuit's theory. As this Court stated in an analogous context, "[i]t is unlikely that if Congress had indeed wrought such a major expansion of criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved." *Enmons*, 410 U.S. at 410. To expand the Hobbs Act in this startling fashion, therefore, and to make that *post hoc* expansion the basis for liability under RICO, raises very serious due process concerns.

This Court should therefore reject the Seventh Circuit's perversely expansive reading of the Hobbs Act.

b. Federalism

This Court should be loathe to interpret federal statutes in ways that "upset the usual constitutional balance of federal and state powers." *New York v. United States*, 505 U.S. 144, 170 (1992) (internal quotation marks and citation omitted). *See generally Gregory v. Ashcroft*, 501 U.S. 452 (1991). "[W]e will

not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336, 349 (1971). This rule militates against turning the Hobbs Act into a device for federalizing such traditional state offenses as trespass, vandalism, and obstruction of public passage. *See United States v. Staszcuk*, 517 F.2d 53, 55 (7th Cir.) (en banc) (per Stevens, J.), *cert. denied*, 423 U.S. 837 (1975).

This Court expressed this very caution in refusing to apply the Hobbs Act to unlawful conduct incident to a labor strike:

> [I]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

Enmons, 410 U.S. at 411 (citations omitted).

Congress has, of course, adopted a scheme of national labor regulations, yet *Enmons* held that there was no clear statement of intent to police the limits of labor demonstrations through the Hobbs Act. Here, there is no national scheme of social protest regulation; *a fortiori*, application of the Hobbs Act to police such protests violates the "clear statement" principle.[41]

[41]Congress knows how to make a clear statement of intent that a statute apply to protest activity. *E.g.*, 18 U.S.C. § 248 (FACE). The present case was not brought under FACE, however, and the Hobbs Act contains no such clear statement.

c. Rule of lenity

Any "uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (and cases cited). The Seventh Circuit's distortion of the Hobbs Act stands this rule on its head, as the Seventh Circuit's interpretation requires both creating ambiguity by rejecting the clear meaning of statutory terms, and then resolving that contrived ambiguity in favor of an extremely broad interpretation.

"The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U.S. at 359-60. This rule serves "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts," *Kozminski*, 487 U.S. at 952.

As a criminal law, the Hobbs Act is subject to this rule of strict construction. *Enmons*, 410 U.S. at 411; *McCormick*, 500 U.S. at 272-73. This Court must therefore reject the Seventh Circuit's bizarre expansion of federal criminal "extortion." A protest sit-in is *not* extortion under the Hobbs Act.

B. Impact of Hobbs Act Error on Disposition of Case

Respondents have never claimed to be able to prove predicate extortion under a proper understanding of the Hobbs Act. Hence, this Court should reverse the Seventh Circuit and remand with instruction that the court of appeals direct the entry of judgment for petitioners on those claims.

Moreover, because state extortion offenses must satisfy a federal minimum essentially equivalent to the Hobbs Act in order to qualify as RICO predicates, those state predicates are also irremediably defective. *See United State v. Nardello*, 393

U.S. 286, 290, 293, 295 (1969); *Taylor v. United States*, 495 U.S. 575, 590-91, 599-602 (1990). *See* OR Pet. at 23-24. NOW's Travel Act predicates, meanwhile, fall with the Hobbs and state extortion predicates. OR Pet. at 4 n.6, 26 n.27. Accordingly, this Court should reverse and remand with instruction to direct the entry of judgment for petitioners on all counts. *See also supra* p. 26 (petitioners attacked NOW's extortion theory with various dispositive motions).

CONCLUSION

This Court should reverse the judgment of the Seventh Circuit and remand with instructions to direct the entry of judgment for petitioners on all claims.

Respectfully submitted this 12th of July, 2002,

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